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No. 85 — October Term, 1946

Supreme Court of the United States

THE TRAILMOBILE COMPANY and INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT and AGRICULTURAL WORKERS OF AMERICA, U. A. W. — C. I. O., Petitioners,

vs.

LAWRENCE WHIRLS, Respondent.

BRIEF OF THE U. A. W.—C. I. O., LOCAL NO. 392, ONE OF THE PETITIONERS HEREIN.

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COURT INDEX PRESS - LAW PRINTERS - CINCINNATI, OHIO.

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I. OPINION OF THE COURT BELOW

The Opinion in the United States Circuit Court of Appeals for the Sixth Circuit (R. 70) is reported in 154 Fed. 2 866.

II. JURISDICTION

The Court granted the petition for certiorari on June 10, 1946, reported in 90 Sup. Ct. Law. Ed. 1260.

III. STATEMENT OF THE CASE

Lawrence Whirls was employed by the Highland Body Manufacturing Company on the 8th day of February, 1935 and worked for them until he entered the armed forces of the United States on October 23rd, 1942; he received an honorable discharge from the military service and was restored by his employer to his former position and seniority rights on May 3rd, 1943.

On December 31st, 1943, the Highland Body Manufacturing Company sold all of its property and assets to the Trailmobile Company which assumed its obligations, its entire operation was transferred to Trailmobile and it took over all of the former Highland Body Manufacturing Company employees as its own employees on January 1st, 1944.

The Union, UAW-CIO, after an election was certified by the National Labor Relations Board as the exclusive bargaining agent for all employees of the Trailmobile Company in December 1943; and as such Bargaining Agent entered into a contract dated July 15th, 1944 giving seniority to the employees of the Trailmobile Company from their date of hiring; and to all former Highland Body Manufacturing Company employees from the day when they became employees of the Trailmobile Company.

Plaintiff has had employment with the Highland Body Manufacturing Company and the Trailmobile Company for some three (3) years since his discharge from the armed forces.

The present suit was instituted by the United States District Attorney on behalf of the plaintiff claiming that plaintiff's statutory rights to seniority as granted by Section 308, Title 50 of the United States Laws are being taken away from him.

The Trailmobile Company now has some 400 returned veterans in its employ and some 40 former Highland Body Manufacturing Company employees, who are returned veterans, in its employ. Any seniority awarded to Highland veterans means that Trailmobile veterans lose their seniority, as it existed when they entered military service.

There was also presented in evidence an agreement between the Highland Body Manufacturing Company and the Trailmobile Company of America, with the United Automobile Workers of America, Local 131, A. F. of L. which was in existence at the time plaintiff entered the armed forces and expired by time limitation before his return. This exhibit (Exhibit C) provides: (R-22)

> Section 6. "Any employee may transfer permanently to another Department but will become the junior to all employees on the seniority list in the Department to which his transfer is made."

The evidence also contains the pleadings, extract of evidence, judgment entry and decree of affirmance, in the case of HESS v. TRAILMOBILE COMPANY OF AMERICA, ET AL. In the decree and entry of affirmance entered by the Court of Appeals, Hamilton County, Ohio, Case No. 6503, paragraphs 1, 2 and 4 read as follows: (R-52, 53)

> "The defendant Union and the defendant company had a legal right to enter into a contract fixing the seniority dates and rights of plaintiff employees as of January 1st, 1944.
>
> Seniority rights are rights arising out of the contract between defendant employer and its employees represented by the defendant union as the exclusive bargaining agent and such seniority rights cannot arise merely by reason of the fact that an employee has worked for an employer for a number of years unless the employer and employee have so contracted.

"The Court further declares that the defendant Union treating the employees of Highland Body Manufacturing Company as new employees of the Trailer Company of America as of January 1st, 1944, acted within their lawful rights in determining that the dissolution of the Highland Body Manufacturing Company terminated the employment of plaintiff and those on whose behalf this action is brought."

Motion to Certify was overruled by the Ohio Supreme Court on October 15, 1945, Sec. 31 O. L. R. 51. (R-55)

The facts then present the following three points:

1) Two corporations having interlocking Board of Directors operated plants in different cities under a collective bargaining contract giving the employees of either plant the privilege of working in departments of other plant by waiving all seniority acquired in the first plant and gaining seniority from the date of hiring in the second plant. One of said corporations purchased all of the assets and assumed the obligations of the other corporation and agreed to employ its employees. The purchasing corporation entered into a collective bargaining agreement with a union certified by the National Labor Relations Board, fixing the seniority of all employees as of the date of hiring, and thus establishing the seniority of the employees of the dissolved corporation as of the date of their hiring by the purchasing corporation.

2) An employee of the dissolved corporation instituted an action in a state court on his own behalf and on behalf of all other employees, and the state court rendered a decision sustaining the collective bargaining agreement, the decision was affirmed by the Appellate and Supreme Court of the State.

3. An employee of the dissolved corporation, who was an honorably discharged veteran, brought action against the purchasing corporation claiming that the collective bargaining agreement was not binding upon him and that the purchasing corporation should award him seniority from the date of his hiring by the dissolved corporation rather than the date of his hiring by the purchasing corporation.

IV. SPECIFICATION OF ERRORS

In the petition for writ of certiorari, the questions presented and the specification of errors are set forth, as follows:

QUESTIONS PRESENTED

Whether subdivisions (b) and (c) of Section 8 of the Selective Training and Service Act of 1940, as amended, gives to a War Veteran who was restored to the position of employment occupied by him prior to his military service, and who was continuously so employed for more than one year, the right to retain the seniority status held by him when he entered the service after that one year reemployment period and "as long as the Act remains in effect, and as long as Whirls remains in the service of the appellant company" notwithstanding the fact that his union, through collective bargaining, had changed the seniority provisions of the employment contract.[1]

---

(1) The changed seniority provision, made after the employee was reemployed for a full year was due to the fact that the parent corporation purchased the assets of its subsidiary corporation; the employees changed union affiliation, and the employees of the subsidiary were held to be new employees by the newly certified union, which the Ohio courts held they had a right to do.)

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 8 (b) and (c) of the selective Training and Service Act of 1940 entitled respondent to seniority as it existed at the time he was inducted into the armed forces, "as long as the Act remains in effect and as long as Whirls remained in the service of the appellant company."

2. In holding that appellants did not have the right to bargain collectively under the National Labor Relations Act and thereby change his (and all other similarly situated) seniority status.

V. ARGUMENT

The statement of the case gives a summary of the evidence and the points of fact and law are set forth. In presenting the authorities in support of the contentions of petitioner, we direct the Court's attention to the following:

A. WHAT IS THE LAW OF OHIO?

Under the laws of our State, as set forth by the Supreme Court of Ohio, an employer may hire or fire employees at any time. See NEW YORK, CHICAGO and ST. LOUIS RAILROAD COMPANY v. SCHAFFER, 65 OHIO STATE, 414:

> "It is the right of every person, natural or artificial, to employ or refuse to employ in his business whomsoever he may wish, and he cannot be called upon to answer for his judgment in that regard by the public or individual, nor the motives which prompt his action be considered. A rail

> road company may lawfully refuse to continue in its employ a person who has engaged in a strike affecting its interests, or who has shown himself to be negligent, incompetent, inefficient or dishonest."

The above decision clearly illustrates that so far as the law of Ohio is concerned an employee has no basis for complaint and that any right given to an employee as to seniority is based entirely on the terms of the contract. In this case the evidence shows that the contract that existed prior to June, 1944 expired by its time limitation and had been abrogated by the National Labor Relations Board when it ordered a new election and certified the UAW-CIO as the new bargaining agent. Any rights that plaintiff has or claims to have must be under the agreement made by the UAW-CIO. He cannot claim rights that the UAW—CIO might have created for plaintiff but is confined only to such as are actually created. These rights consist of seniority as of January 1st, 1944.

The State Court determined from the evidence that the two corporations were to be considered as separate and distinct corporate entities. (R-55). Its decision is in line with the holding by this Court in the case of SCHENLEY DISTILLERS CORP. v. U. S. et al, 90 Sup. Court Law Ed. 217, decided January 2, 1946 wherein the court, at page 219, stated:

> "While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person. One who has

created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public.

The fact that several corporations are used in carrying on one business does not relieve them of their several statutory obligations more than it relieves them of the taxes severally laid upon them. 'If the one business could not be carried on without two corporations taking part in it, each must pay, by the plain words of the Act.' *"Edwards* v. *Chile Copper Co.* 270 U. S. 452, 456, 70 L. ed 678, 682, 46 S. Ct. 345. Cf. *Gray* v. *Powell,* 314 U. S. 402, 414, 86 L. ed. 301, 311, 62 S. ct. 326; *Moline Properties* v. *Commissioner of Internal Revenue,* 319 U. S. 436, 87 L. ed. 1499, 63 S. Ct. 1132."

The evidence disclosed that the class suit which had been instituted in the State Court was brought at a time after Plaintiff-appellee had returned from the military service, *while he was working at the plant and was named as one of the parties in the class suit.* The main issues decided in the State Court were fully determinative of the contentions being made in this case and certainly were issues that could have been fully determined in the State Court and would be just as binding as an adjudication.

"A prior judgment is a finality as to the claim or demand in a controversy, concluding parties and those in privity with them not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." FISHGOLD v. SULLIVAN D. & R. CORP., SUP. CT. L. ED. 90, PAGE 962

B. WHAT RIGHTS DOES PLAINTIFF HAVE UNDER THE SELECTIVE SERVICE ACT?

In the first place it should be kept clearly in mind that this case does not involve the failure of the employer defendant to restore the plaintiff to his former position and employment. Under the contract that existed when he entered the armed services, if he elected to be transferred from the Highland Body Manufacturing Company to the Trailmobile Plant his "seniority" would start from the date of employment at the Trailmobile Plant.

In any event, it is clear from the record that plaintiff was restored to his former position and for 35 months after such restoration was not denied work on a single day . . . in fact, plaintiff's counsel stipulated that the employer defendant had restored the plaintiff to his former position on February 8th, 1943. Accordingly, there is not involved in this case any question of whether an employer may refuse to restore a veteran to his old position on the ground that the amount of work available in the employer's plant is sufficient only to afford employment for employees of greater seniority than possessed by the veteran. The sole issue here involved is whether an employer, after having restored a veteran to his former position, contravenes Section 8 (c) of the Act, if after the veteran has had 35 months employment, by reason of a bargaining contract his seniority date is fixed as of January 1, 1944.

> "(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the em-

> ployer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

Section 8 (c) provides that the veteran restored to his former position "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces". In the same sentence of Section 8 (a) is contained the further provision that the veteran shall be restored to his position "without loss of seniority". In other words, Congress directed that as to insurance and other benefits the restored veteran's rights should be governed by the employer's "established rules and practices" as to such other benefits, and at the same time provided that the veteran should be restored to his position "without loss of seniority". It is thus obvious that Congress used the word "seniority" in a meaning different from that in which it used the phrase "established rules and practices"; it is equally obvious that Congress must have meant that benefits governed by seniority were different from the "other benefits" governed by other "rules and practices". What phase of the employment relation did Congress deem to be governed by "seniority"? Why did it provide against the restored veteran's loss of "seniority"? Congress could not have intended that "seniority" govern the order of "discharge" since as to "discharge" Congress itself provided a governing rule in Section 8 (c) — that a "discharge" could not be made except for cause. Equally Congress could not have intended that "Seniority" govern insurance and similar benefits since

it provided that such benefits be governed by "established rules and practices". The remainder of the area of employer-employee relationship to which the word "seniority" as used by Congress can apply, is therefore the restricted area of transfer, promotion and lay-off.

Thus, from the language of Section 8 (c) of the Act it must be clear that by the word "seniority" Congress was referring to the position which the veteran occupied before entering the military service. At the time of the plaintiff's induction into the armed forces he had no seniority standing whatsoever on the list of the Trailmobile Company. The "seniority" that is given to him can certainly be no greater than "employment" which he received. If after one year the plaintiff may be "discharged from such position without cause" then how can it be contended that his "seniority" standing cannot be affected? Certainly, the whole (employment) is greater than any of its parts (seniority).

This Court, in the Fishgold case, *supra*, syllabus 11, decided as follows:

> "The "position" in his former employment to which, under the provisions of the Selective Training and Service Act of 1940, a discharged veteran is to be restored, is the "position" which he left, plus accumulated seniority."

At page 967, the Court said:

> "We can find no support for petitioner's position in the provision of Section 8 (b), which restores him to his former position or to a "position of like seniority". Nor can we find it in Section 8 (c) which directs that he "shall be so restored without loss of seniority". As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his ab-

sence. He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. *But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services.* We agree with the Circuit Court of Appeals that by these provisions Congress made the retoration as nearly a complete substitute for the original job as was possible. No step up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more."

At page 969, the Court said:

"Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. *What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year.*"

The Circuit Court of Appeals felt that it was not bound by the issue of fact which had been fully determined by state court wherein it held that the two corporations were separate corporate entities. The decision was based on the undisputed facts and a similar holding was required not only because of such prior adjudication but also on the facts in this case. In this, we think the Court erred.

In its opinion, the Circuit Court was of the belief that the Congressional Act here involved *created seniority systems in plants,* whether or not seniority systems theretofore existed (R. 77). Such construction is diametrically opposed to the provisions of the Act and the decision of this Court, in the Fishgold case. The respondent, in this case entered military service, leaving a position with the Highland Body Manufacturing Company in its paint-shop, having a seniority status on its payroll beginning in February, 1935. He had seniority of superior rights under the contract then existing in the Highland Body paint shop over all other employees who had been hired subsequent to that date. *He had no seniority rights in the paint shop of the Trailmobile Company.* Employees of the paint shop of the Trailmobile Company who had been hired subsequent to 1935, when they entered military service, had a right upon return to their jobs to be placed at the same point where they had left off, with only those ahead of them who had been hired by the Trailmobile Company prior to their date of hiring. *The decision of the lower Court, in this case, places the respondent in the Trailmobile Company paint shop ahead of Trailmobile veterans and, in effect, deprives the latter veterans of their seniority rights.*

The effect of the lower Court's decision is to place the Union in a position where it must do one of two things, (a) either discriminate against the Trailmobile veterans and allow the Highland veterans to supercede them on the seniority list, or, (b) in fairness to the Trailmobile veterans, negotiate for the discharge of Highland veterans at the end of one year's guaranteed employment. By this strained construction placed on the Act of Congress, the Courts are turning a veteran's benefit into an absolute detriment.

From what has been said above, it must be evident that:

1. The question involved in this case as to the propriety of fixing seniority of former Highland Body Manufacturing Company employees as of January 1st, 1944 has been considered and adjudicated by the State Courts.

2. There is nothing in the Selective Service Act which sets up a system of seniority unless seniority exists in the plant by reason of a bargaining contract or a private contract between the employer and employee.

3. The Selective Service Act cannot be stretched to give the Federal Court jurisdiction beyond the utmost relief it granted to returning veterans of "re-employment for one year".

4. The Selective Service Act cannot be extended to provide for discrimination between veterans, by giving the 40 returning veterans of the former Highland Plant superior rights over the 400 returning veterans of the Trailmobile Company Plant.

5. The Selective Service Act does not restrict a Union, as Bargaining Agent certified by the N.L.R.B., from entering into a contract with the employer, which provides for seniority status for employees, even though as an incident thereof, but without discrimination or fraud, it may affect the seniority status of veterans.

RELIEF

We respectfully submit that plaintiff was not entitled to the relief prayed for and that this Court should reverse the judgment of the lower court and order the dismissal of the Complaint.

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